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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

74-1479

No. _____

ISAAC LEE, Petitioner

vs.

UNITED STATES, Respondent

Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No.....

ISAAC LEE, Petitioner,

UNITED STATES, Respondent.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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Isaace Lee, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this case on April 24, 1975.

Opinion Below

The opinion of the Court of Appeals below (Appendix) has not yet been reported. The opinion of the District Court below (Appendix) was not reported.

Jurisdiction

The judgment of the Court below (Appendix) was entered on April 24, 1975.* Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

*Decided on April 24, 1975

QUESTIONS PRESENTED FOR REVIEW

A.

Whether the Defendant's character and reputation were improperly attacked by the prosecution, at a time when the Defendant had not submitted his character and reputation in issue in the case, by the government's attempts to show that the Defendant was a violent man who would threaten the safety of a witness, and whether the attack deprived the Defendant of a fair trial and due process of law, requiring a reversal of the decision of the Court of Appeals as being in opposition to the United States Supreme Court decision in Michelson vs. United States, 333 U. S. 469.

B.

Whether the constitutional guarantees of fundamental fairness to an accused were violated when the trial court permitted the testimony of an unindicted co-conspirator which was favorable to the Defendant to be impeached by the said unindicted co-conspirator's attorney which impeachment consisted of the use of certain confidential communications which were made by the said witness and which were critically prejudicial to the Defendant.

C.

Whether the Defendant was deprived of due process of law when the prosecution was permitted to comment in its closing argument regarding the Defendant's failure to call his wife as a witness, and whether the Supreme Court should exercise its power to make uniform the Federal Criminal Rules by ruling that an accused in a criminal

proceeding has a privilege to prevent his spouse from testifying against him and that the failure of an accused to call his spouse is not a proper subject of comment by government counsel.

D.

Whether the Defendant was deprived of due process of law as the result of a charge to the jury by the trial court on the issue of reasonable doubt, in which charge the trial court failed to charge that reasonable doubt may arise from a lack of evidence as well as from actual evidence, which improper charge was in violation of the fundamental fairness which must be accorded to every accused pursuant to the Constitution of the United States.

E.

Whether the Defendant's rights were violated when the trial court allowed the introduction of packages of white substance (allegedly heroin) into evidence when the substance could not be identified by the government's chemist, and when the government could not establish a proper chain of custody of the said substance from the time of the alleged sale, to the time of the actual laboratory testing, to the time of the attempted identification of the substance at the trial of the case.

F.

Whether the jury's acquitting the Defendant of distributing heroin (which charge was predicated upon the Defendant's alleged aiding and abetting, rather than upon his making the actual sale) and yet convicting the Defendant

of the conspiracy count was fatally inconsistent due to the fact that the same elements in this case which constituted the aiding and abetting charge also constituted the elements of the conspiracy charge, and whether the inconsistency in the verdict manifested a failure on the part of the jury to properly understand the nature of the charges brought against the Defendant and manifested a failure on the part of the trial court to accord the Defendant a fair trial.

G.

Whether the Defendant was denied due process of law and whether the Defendant's rights were violated under the Fifth and Sixth Amendments and under the Federal Rules of Criminal Procedure, Rules 8(a), 7(c) and 14 (which prohibit multiplicity and duplicity of charges against an accused) by the government's use of the following terminology in the first and second counts of the indictment, to wit:

FIRST COUNT

"...in violation of Title 21, United States Code Section 841 (a) (1) and 846".

SECOND COUNT

"...all in violation of Title 21, Section 841 (a)(1) and Title 18, United States Code, Section 2".

Constitutional Provisions and Statutes Involved

Rule 7(c) Federal Rules of Criminal Procedure:

"(c) Nature and Contents.

(1) In general. The indictment or the information shall be a plain, concise and definite written statement of the essentail facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or ther provision of law which the defendant is alleged therein to have violated."

***

Rule 26, Federal Rules of Criminal Procedure:

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise

provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience".

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Rule 8 (a), Federal Rules of Criminal Procedure:

"(a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected or constituting parts of a common scheme or plan".

***

Title 21, USCA Section 846, page 179:

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy".

***

Title 21, USCA Section 841 (a) (1), page 75:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

Title 18,USCA Section 2 page 57:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

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The Fifth Amendment, United States Constitution

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The Sixth Amendment, United States Constitution

STATEMENT

Petitioner was indicted on a two count criminal indictment in the United States District Court for the District of South Carolina, Florence Division, which indictment charged the Petitioner with conspiring to distribute heroin and with distributing heroin. The basis for federal jurisdiction was the alleged violation by the Petitioner of federal narcotics laws. Petitioner had been previously tried on charges arising out of the same transaction, and his conviction was reversed by the Court of Appeals for the Fourth Circuit. After Petitioner's second jury trial he was acquitted of aiding and abetting the distribution of heroin but was convicted on conspiracy. Petitioner was sentenced to a total of ten years imprisonment, to be followed by a special parole term of three years.

The trial arose out of an incident which occurred on January 25, 1972, at Atlantic Beach, South Carolina, when an unindicted co-conspirator, one Gore, made a sale of a certain substance, allegedly heroin, to a government agent and to a government informer, which transaction took place shortly before the arrival of Petitioner at the scene.

The indictment is set out in the appendix. The first count of the indictment at the end of the first paragraph has the following statement:".... in violation of Title 21, U. S. Code Section 841 (a) (1) and 846". The second count also charged the Petitioner with violating Section 841 (a) (1). The first count of the indictment was so worded as to include in it a

charge of the violation of the code section which was also charged in the second count.

During the course of the trial, the trial court permitted the government to cross-examine one of the Petitioner's witnesses, Gore, regarding certain confidential communications which said witness had made to his attorney, which statements were in reference to the Petitioner and which were prejudicial to him. Furthermore, the trial court also permitted said witness's attorney to take the witness stand and repeat the said confidential, privileged communications in an effort to impeach his client.

The communications were critically prejudicial to the Defendant because they made the Defendant appear to be a man of violence and one who had threatened the safety of a witness. The said attorney stated that Gore had told him the following: "I am afraid to testify against Lee (the Defendant herein) because of what might happen here or later". The said testimony constituted an attack upon the character and reputation of the Defendant at a time when the Defendant's character had not been put in issue by the Defendant.

The government attempted to identify the substance in issue by use of certain expert testimony; however, the government failed to properly establish a chain of control and possession of the substance from the time of the sale to the time the substance was presented at the trial for identification. Furthermore, the expert government witness, a

chemist, was unable at the trial of the case to specifically identify the substance presented to him as being the substance which he had examined at his laboratory prior to trial. However, over defense counsel's objections, the court allowed the introduction of the packets of white powder as the the heroin in issue.

Petitioner did not call his wife as a witness during the trial. The government's attorney, in his closing jury argument, made damaging comments regarding Petitioner's failure to call his wife as a witness on his behalf.

The trial court in its charge to the jury commented upon the issue of reasonable doubt; however, the court improperly refused defense counsel's request to instruct the jury that reasonable doubt could be found from a lack of evidence as well as from actual evidence presented.

At the conclusion of the trial the jury returned a verdict in which it acquitted the Petitioner of aiding and abetting the distribution of heroin, which constitutes the second count of the indictment, but convicted the Petitioner of conspiracy which constituted the first count.

REASONS FOR GRANTING THE WRIT

A.

The Court of Appeals has decided a federal questions in a way in conflict with the applicable decisions of this Court.

This Court has previously held that it is prejudicial error for the prosecution to attack an accused's character and reputation at a time when the accused had not submitted his character and reputation in issue in the case. Michaelson vs. United States, 333 U. S. 469. Over objection of defense counsel the trial court permitted, and the Court of Appeals affirmed, the introduction of testimony by a witness which necessarily prejudiced the Petitioner in the eyes of the jury and effectively prevented him from receiving a fair trial. The prosecution,on cross-examination, attempted to establish from a witness, one Gore, an unindicted co-conspirator, that the Petitioner had made threats against Gore and had attempted to prevent him from testifying. The government also called to the witness stand Gore's attorney, who impeached the testimony of Gore and who stated that Gore had made the following statement to him: "I am afraid to testify against Lee because of what might happen here or later". The obstensible reason for the prosecution's producing such testimony was to impeach the credibility of Gore, who had testified that the Petitioner had nothing to do with the sale or with any conspiracy to sell heroin. However, the obvious effect of the testimony was to critically damage the character of the Petitioner and to make him appear to the jury to be one who would use threats of violence to quieten an otherwise unfavorable witness. It is respectfully submitted that the testimony which was presented by Gore and by his attorney, Mr. Porter, regarding the alleged threats by the Petitioner against Gore

so tainted the attitude of the jury against the Petitioner that it was impossible for him to have received a fair and impartial trial, and he was effectively denied due process of law. There was no overriding necessity to have the alleged threat presented into evidence. It tended to show merely that Lee was a "bad man", likely to commit violations of the law, and this is precisly what the prosecution is not allowed to show in a criminal case when a defendant's character has not been put in issue. 1 Wigmore on Evidence (3rd edition 1940), Section 194 at page 646. In all criminal cases the evidence must be carefully viewed for the possibility of prejudice. Beatty vs. United States, 389, U. S. 45. Evidence which has no tendency, or only a slight tendency to establish the guilt or innocence of the accused, and which, if effective at all, would serve only to prejudice or mislead, or excite the minds and inflame the passions of the jury should not be admitted; and the Court should give to the accused the benefit of any reasonable doubt with the respect to the impact of prejudicial testimony on the fairness of the trial process.

B.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Petitioner together with one Gore and one Vaught were previously indicted as a result of the transaction in question. Both Gore and Vaught were

previously indicted as a result of the transaction in question. Both Gore and Vaught were represented by the same attorney, Mr. Charles Porter, Esquire. Gore entered a guilty plea prior to the original trial, and both the Petitioner and Vaught were convicted, but their convictions were reversed by the Court of Appeals, and a new trial was granted. Prior to the second trial Mr. Porter visited with Gore at the Federal Pentitiary and communicated with him regarding certain aspects of the transaction in question, and during said conversation Gore made certain statements which contained allegations damaging the character and reputation of the Petitioner. Before the commencement of the second trial Mr. Porter negotiated a guilty plea for Vaught, and Vaught agreed to testify against the Petitioner at the second trial. During the second trial Gore testified on behalf of the Petitioner and said that he, Gore, was the responsible party and negotiated and participated with Vaught in the sale of the alleged heroin, and that the Petitioner had nothing to do with the procurement of the alleged heroin or with any sale.

Upon cross-examination the prosecution obtained an admission from Gore that he had made some reference that he was afraid to testify at the second trial but he denied that there was any coersion exerted against him by the Petitioner. The prosecution called Mr. Porter as a witness for the government to impeach the credibility of Gore, and Mr. Porter testified regarding the statements which were made to him by Gore

at the Federal Pentitiary regarding his alleged apprehension of testifying.

It is the position of the Petitioner that the favorable testimony from Gore was unfairly and improperly impeached by the prosecutions's use of statements which were made on a confidential basis to an individual who was his attorney and with whom a special and unique relationship was still in existence. It reflects improperly upon the judicial process when an attorney is permitted to take the stand to specifically impeach the veracity and credibility of a witness with whom such a confidential and fiduciary relationship existed. It is the position of the Petitioner that the Court of Appeals should have recognized the improper conduct of Mr. Porter and should have granted the Petitioner a new trial. Mr. Porter's conduct was improper because he was willingly being used as "an arm of the police" in extracting statements from Gore to use to further the interests of his other client, Vaught, and to assist the prosecution in convicting the Petitioner. Because of his fiduciary relationship the testimony of Mr. Porter should not have been accepted into evidence.

C.

The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

The Court of Appeals by failing to

reverse the trial court has approved of a practice by the prosecution of commenting upon an accused's failure to call his spouse as a witness, thus, in effect, establishing federal common law on this subject. It is respectfully submitted that this Court should exercise its power of supervision by establishing a uniform rule of federal criminal evidence that an accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him and that the failure of an accused to call his spouse is not a proper subject of comment by government counsel.

This Court, by reason of Rule 26 of the Federal Rules of Criminal Procedure, has the power to make uniform the federal common law rules of evidence. The Court has previously made decisions on questions of evidence in federal cases and, in more particularly, in questions of privileged communications between husband and wife and the competency of the wife as a witness on behalf of or against her husband. Funk vs. United States, 290, U. S. 371. Rule 501 of the Federal Rules of Evidence, which was enacted January 2, 1975, and which goes into effect July 1, 1975, continues the prerogative of this Court to make uniform the federal common law regarding privileged communications.

It is the position of the Petitioner that this Court should adopt as a standard and uniform rule of evidence that an accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him and

and that no adverse comment or inference may be permitted to be made by the prosecution regarding the failure of an accused to call his spouse as a witness. It is the contention of the Petitioner that this Court should exercise its power and adopt the above rule as that which provides for the greatest degree of fair play and justice in light of reason and experience. Public policy would best be served by providing that marital harmony shall not be jeopardized by the dissention and the repugnancy which may result by requiring a person to condemn or be condemned by his or her spouse. While the privilege is not constitutionally based, it is nevertheless founded upon important policies and is entitled to maximum effect. To enforce the privilege the Court should forbid comment upon the exercise of the privilege.

Although no objection was made by counsel for Petitioner at the time of the trial when the damaging jury argument was made by the prosecution, the Petitioner contends that this Court, (by virtue of the plain error contained in Rule 52 (b) of the Federal Rules of Criminal Procedure) should intervene and exercise its power to reverse the decision of the Court of Appeals and grant the Petitioner a new trial. It is respectfully submitted that the prejudicial effect of the government's jury argument would have been compounded by objection at the time of trial. The matter of the Petitioner's exercising his right to refuse to have his wife testify would have had to have been explained to the jury, and this would have magnified the prejudice.

D.

The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

At the end of the judge's charge to the jury, counsel for the Petitioner requested the court to charge that the jury could find a reasonable doubt from a lack of evidence. The court denied this request on the basis that a full and proper charge had been given. It is respectfully submitted that a full and proper reading of the trial court's charge will show that the court limited the jury's consideration to only that evidence which had been admitted during the trial of the case. The court in Hollard vs. United States. 209 F. 2d 516 has held that a reasonable doubt as applied to a measure of its persuasion means a real or substantial doubt generated by evidence or lack of it. It is the position of the Petitioner that the law is clear that an accused is not granted a fair trial and is denied due process of law when a jury is not granted the right to consider a lack of evidence in resolving the issue of reasonable doubt. Accordingly, the Court of Appeals, in confirming the trial court, has rendered a decision which is in conflict with the decisions of other Courts of Appeal and the case should be reversed and the Petitioner granted a new trial.

E.

The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter and with applicable decision of this Court.

It is respectfully submitted that the trial court committed reversible error in permitting the government to introduce into evidence the plastic bag identified as government exhibit #2, which allegedly contained a controlled substance, i. e. heroin. Although it is the government's position that the substance contained in the exhibit was the very same substance which was purchased from Gore and which was examined at the government's laboratory, the government failed to properly authenticate the said demonstrative evidence by any testimony which would show that the substance had any connection with the trial of the Petitioner. Without proper authentication, the evidence was irrelevant and this introduction was prejudicial and the government's entire case falls.

The government sought to identify the substances through a chain of possession from Gore to Dean to other government officials and ultimately to the chemist, one Prall, who allegedly conducted an analysis of the substance. However, although the chemist was permitted to testify, over objection of Petitioner's counsel, that he analyzed and identified some substance as heroin, there was no competent proof that the substance he analyzed was the substance purchased from

Gore. There was a hiatus in the crucial chain of possession from Gore to the chemist. Although the chemist testified that he had received the substance from one Perillo, the said Perillo did not testify and there was no testimony as to the identity of the person or persons from whom Perillo had received the material. There was a total absence of any testimony regarding any protective control, custody, supervision or possession in connection with the source from which Perillo had received the substance.

Furthermore, when the government placed the chemist on the witness stand and attempted to have him identify the specific exhibit, he was unable to do so. He could not say that the substance he had previously examined and analyzed two years previously was in fact the substance identified as exhibit #2.

When the said demonstrative evidence is eliminated from consideration, it is apparent that the government's case must fall, because there was no other legally sufficient proof of the presence of any "controlled substance". A conspiracy to violate a "controlled substance" statute cannot be established without the essential element of proof of the intent to deal in the prohibited substance. Lack of proper proof of the presence of the "controlled substance", in conjunction with the particular facts and cirsumstances of the instant case, vitiates the ingredient necessary to construct the foundation of intent.

F.

The Court of Appeals has decided a federal question in a way which conflicts with the modern trends of the Court on the subject.

According to the government's theory of the case, the Petitioner was charged with two counts: (1) conspiracy to sell narcotics and (2) selling narcotics. The government's case regarding the second count was based on the theory that the Petitioner was an aider and abettor rather than a principal. The government attempted to prove that Gore actually sold the alleged heroin, and that the Petitioner aided and abetted the sale by his making the alleged heroin available to Gore through his possessing and transporting the substance from New York to South Carolina. The jury obviously did not accept the government's theory because it acquitted the Petitioner of the second count; however, it convicted the Petitioner on the conspiracy count.

It is respectfully submitted that the verdict is factually and legally inconsistent and should be set aside by this Court. The inconsistency in the verdict can be readily observed, even while viewing the government's case in the most favorable light, by a proper appraisal of the facts and circumstances which were developed at the trial of the case. The government's theory of the case was the active participation by the Petitioner. The government's case could only have established that the Petitioner was a participant or that he was innocent; the evidence which the

government presented and the overt acts which were set forth in the indictment suggested only the theory of participation. This theory was rejected by the jury, and with its rejection the basis for the conspiracy count was destroyed.

The verdict was obviously arbitrary and irrational, and it is respectfully submitted that the jury's acquitting the Petitioner of the second count should effectively preclude the court from permitting the conviction on the conspiracy count to stand, and, as a matter of law, the defendant should be totally acquitted of all counts or granted a new trial.

It is acknowledged that the United States Supreme Court has in the past held that an actual and apparent inconsistency in a jury verdict in a criminal case is no basis for setting a verdict aside, U. S. vs. Dunn, 284 U. W. 390 (1932). However, it is respectfully submitted that the said holding is no longer in consonance with the modern trends of criminal justice, nor were the facts in said case directly the same on each count as they are in the instant case. An irrational jury verdict reflects an obvious failure of the trial process; it manifests an incomplete understanding on the part of the jury of the issues involved. Furthermore, jury confusion is compounded by an instruction by the trial judge that inconsistent verdicts are acceptable.

The defendant requests that this Court re-examine this matter and hold that prior case law is outdated and in violation of due process of law. See Ex Parte Johnston, 43 P. 2d 541 (Cal.)

G.

The Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court.

The first count of the indictment, at the end of the first paragraph has the following:

> "In violation of Title 21, U. S. Code, Section 841 (a) (1) and 846."

The second count also charges the Petitioner with violating Section 841 (a) (1). It is obvious on the face of the indictment that the first count was so worded as to include in it a charge of the violation of the Code section which was also charged in the second count. The first count is obviously duplicitious because it charges a violation of two separate criminal sections. It is also to be noted that the indictment is defective because of the multiplicity of charges in that such violation of Section 841 (a) (1) was charged in both counts.

The commission of a substantive offense and the conspiracy to commit it are separate and distinct crimes. Pereira vs. U. S., 347 U. S. 1. Under Rule 8 (a) of the Federal Rules of Criminal Procedure the charging of two offenses in one count is erroneous duplicity.

It is respectfully submitted that by the phrasing of count 1, the defendant Lee was denied his rights under Rule 8 (a), which requires that there be "a

separate count for every offense". Additionally, the wording of count 1 in the indictment was in violation of Rule 7(c) of the Federal Rules of Criminal Procedure, and in violation of the Sixth Amendment of the United States Constitution which requires that a defendant have notice of the "matter of and cause of the accusation" against him.

The United States Supreme Court has recognized since 1896, in the case of Crain vs. U. S., 162 U. S. 625, that the rule as to indictments for crime is that two offenses may not be charged in the same count.

Duplicity in indictment or information is not a mere technical defect, to be disregarded, but is one that substantially affects the rights of the defendant. Creel vs. U. S.,21 F 69.

It is further submitted that by said duplicity, the defendant was denied his right under the Fifth Amendment of the Constitution of the United States against self-incrimination, because the defendant may have desired to have taken the witness stand as to the violation of one code section, but not as to the other; but he was effectively prevented from doing so and was thereby prejudiced by the government's jumbling of two code sections in one count.

It is further submitted that by merging the violation of the second count into the first count the defendant was placed in double jeopardy because he could have received consecutive sentences on the first and second count; and,

further, this was a violation of Rule 14 which states that there should be an election if there is an improper joinder of offenses, which the Petitioner Lee contends occurred here.

Certainly it was not necessary for the prosecution to charge the Petitioner with a violation of the conspiracy statute in order to also have charged him with a violation of the distribution statute, because they are separate and distinct offenses. See Pinkerton v. U. S., 328 U. S. 640.

CONCLUSION

The judgment below represents a departure from this Court's decisions regarding the impropriety of the prosection's dragging the accused's character into consideration. The conduct of the attorney for Gore was in breach of his relationship to Gore and was consequently in violation of the Petitioner's right to a fair and impartial trial. The charge of reasonable doubt was incorrectly given to the jury. This Court should establish a rule of federal criminal evidence that will protect an accused from having to call his spouse as a witness against him. The alleged heroin substance was improperly admitted into evidence. The verdict was fatally inconsistent, and the indictment was duplicitious and multiplicitious. This Petition should, therefore, be granted.

Respectfully submitted,

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and

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APPENDIX

Indictment

First Count

THE GRAND JURY CHARGES:

That commencing on or about the 23rd day of January, 1972, the exact date to the Grand Jury being unknown, and continuing thereafter to and including on or about the 18th day of February, 1972, in the District of South Carolina and in the State of New York, the defendants ISAAC LEE and ARTIS LEE VAUGHT unlawfully, knowingly and wilfully did combine, conspire, confederate and agree together with Raymond Gore, a co-conspirator not indicted, to distribute for renumeration in the District of South Carolina a Schedule I Controlled Substance as set forth in Title 21, United States Code, Section 812, to wit, heroin, in violation of Title 21, United States Code, Sections 841 (a) (1) and 846.

That the said defendants, having conspired, combined, confederated and agreed with co-conspirator Raymond Gore, not indicted, as aforesaid, and in pursuance of such conspiracy and during its continuance and to effect the object thereof, did commit numerous overt acts within the District of South Carolina and elsewhere, among which overt acts are the following, all done within the District of South Carolina except those specifically alleged as having been committed outside said District, to wit:

(OVERT ACTS OMITTED)

Second Count

THE GRAND JURY FURTHER CHARGES:

That on or about the 25th day of January, 1972, at Atlantic Beach, South Carolina, defendants ISAAC LEE and ARTIS LEE VAUGHT unlawfully, knowingly and wilfully did, with unindicted co-conspirator Raymond Gore, distribute for remuneration approximately 15.511 grams of heroin, a Schedule I Controlled Substance as set forth in Title 21, United States Code, Section 812, all in violation of Title 21, United States Code, Section 841 (a) (1), and Title 18, United States Code, Section.

A true Bill.

***

JUDGMENT AND COMMITMENT

On the 20th day of June, 1974, came the attorney for the government and the defendant appeared in person with retained counsel, Isadore Lourie, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of Not Guilty entered February 6, 1974, and Jury Verdict of Guilty to Count 1 returned May 9, 1974, of the offense of violation of Title 21, U. S. Code, Section 846 as charged in Count 1 of the Indictment.

And the Court having asked the defendant whether he had anything to say why judgment should not be pronounced and no sufficient cause to the contrary being shown or appeared to the Court, IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years to be followed by a special parole term of three years under the provision of Title 21, U. S. Code Section 841 (1) (A).

ADJUDGED that Count 2 is hereby dismissed.

***

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 74-1828

United States of America,

Appellee,

v.

Isaac Lee,

Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Robert F. Chapman, District Judge.

Argued April 11, 1975 Decided April 24, 1975

Before [illegible] and [illegible], Circuit Judge, and [illegible], * District Judge.

[illegible] and Thart A. Diamond (on brief) for Appellant; Jack A. Marshall, Assistant United States Attorney, [illegible] Ortique, United States Attorney, and Marvin Smith, Assistant United States Attorney, (on brief) for Appellee.

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*Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

PER CURIAM:

After examination of the record and consideration of the briefs and oral arguments we find no reversible error.

AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1479

ISAAC LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that the government improperly impeached a defense witness; (2) that the prosecutor's comment during closing argument, in regard to the failure of petitioner's wife to testify, was improper; (3) that the trial judge improperly instructed the jury on the issue of reasonable doubt; (4) that a government exhibit was improperly admitted into evidence; (5) that the jury's verdict was inconsistent; and (6) that the indictment was defective.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Pet. App. 27).[1] Petitioner was sentenced to 10 years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 28-29).

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[1]Petitioner was acquitted by the jury on a charge of distributing heroin, in violation of 21 U.S.C. 841(a)(1).

On January 23, 1972, a government informant and Agent Ellis Dean of the Bureau of Narcotics and Dangerous Drugs met with Raymond Gore in Atlantic Beach, South Carolina. Gore agreed to sell one ounce of uncut heroin to Dean but stated that he would need to contact his "man," referred to as "Ike" or "New York Ike," in order to obtain it (Tr. 131-132). Petitioner was known as "Ike" to Gore and others (Tr. 424, 492). The next morning Gore placed a telephone call to petitioner's home in New York (Tr. 56, 155) and made arrangements for the heroin to be delivered in Atlantic Beach on January 25, 1972 (Tr. 59-62, 245).

Petitioner arrived in Atlantic Beach on the morning of the delivery date and went to Artis Vaught's apartment, where he hid a packet of white powder (Tr. 314). Petitioner subsequently met with Gore, Dean, and the informant and told them that the "stuff" was at Vaught's apartment (Tr. 249). That evening at Vaught's apartment, Gore delivered about one-half ounce of heroin to Agent Dean in exchange for $1,500 (Tr. 85-87). Petitioner was not present during the sale but walked in immediately afterward and asked Dean if the "stuff was good" and if he needed material to cut the heroin (Tr. 88). Petitioner also stated that if Dean and the informant wanted more heroin, they would have to come to New York and purchase a greater quantity (Tr. 89-90, 258). Gore attempted at that point to give the $1,500 to petitioner, but petitioner refused to accept the money while Agent Dean was in Vaught's apartment (Tr. 258). Petitioner instead waited until the next morning to receive the proceeds of the sale (Tr. 521).

Petitioner testified and denied any involvement in the heroin sale (Tr. 511). Gore testified for the defense; he also denied that petitioner was involved. The government presented evidence on rebuttal that Gore may have feared reprisal by petitioner (Tr. 551).

1. Petitioner argues (Pet. 10-14) that the government improperly impeached Gore's testimony by presenting evidence that Gore had admitted he was afraid to testify against petitioner because of "what might happen here or later" (Tr. 551). Although Gore denied making the statement (Tr. 488), Charles Porter, Artis Vaught's attorney, testified that Gore had made that statement in his presence (Tr. 551). Petitioner argues that Porter's testimony was inadmissible because it reflected adversely on petitioner's character and reputation and, alternatively, because it violated a confidential attorney-client relationship between Porter and Gore.

The evidence was presented to demonstrate Gore's motive for testifying, not for the purpose of attacking petitioner's character. Evidence of a witness's fear of reprisal is admissible to impeach his testimony regardless of any indirect effect it may have on the jury's assessment of the character of the accused. *United States* v. *Cerone*, 452 F.2d 274 (C.A. 7), certiorari denied, 405 U.S. 964; *United States* v. *DeLutro*, 435 F.2d 255, 256-257 (C.A. 2), certiorari denied, 402 U.S. 983.

There was, moreover, no breach of a confidential relationship by Porter in revealing Gore's fear of petitioner. Although he had been Gore's attorney in the past, Porter did not represent Gore at the time the statement was made, and Gore had been advised of that fact (Tr. 463-467). In any event, the privilege of excluding from evidence a client's confidential communications to his attorney is a personal privilege of the client; it cannot be asserted by a third party, such as petitioner. See, *e.g.*, McCormick, *Evidence*, §92 (2d ed. 1972).

2. Petitioner also contends (Pet. 14-16) that the prosecutor improperly commented during closing argument on the failure of petitioner's wife to testify (Tr. 586-587). Even assuming that an accused's failure to call his spouse is not a proper subject of comment by government counsel, petitioner did not object to the prosecutor's remark in this case.

Moreover, the district court instructed the jury that "the law never imposes upon the defendant in a criminal case the burden or the duty of calling any witnesses or producing any evidence" (Tr. Ch. 3, 11). That instruction was sufficient, in view of petitioner's failure to object or request additional instructions, to cure any prejudice that may have been created by government counsel's remark. See *United States* v. *Kirk*, 496 F.2d 947, 951 (C.A. 8).

3. Petitioner argues (Pet. 17) that, by refusing to instruct the jury that a reasonable doubt could be created not only by the evidence presented but also by a lack of evidence, the district court erroneously precluded the jury from considering a lack of evidence in resolving the issue of reasonable doubt.

The substance of the instruction requested by petitioner, however, was implicit in the instructions given by the court, which placed the burden on the government to prove its case beyond a reasonable doubt. Since the instructions already given fully informed the jury of the basic concept of reasonable doubt (Tr. Ch. 10-11), it was not error for the court to refuse to use the specific language requested by petitioner. See *United States* v. *Caruso*, 358 F.2d 184, 186-187 (C.A. 2), certiorari denied, 385 U.S. 862.

4. Petitioner contends (Pet. 18-19) that the evidence was insufficient to support his conviction, because the government failed to establish that the heroin admitted into evidence at trial (Gov't Ex. 2) was the substance sold by Gore to Agent Dean.

Agent Dean gave the packet containing the white powder he received from Gore to Agent Shumard of the Drug Enforcement Administration (Tr. 94). Agent Shumard testified that, after placing the packet securely in a "lock-seal" envelope (Gov't Ex. 1), which could not be opened without being torn or destroyed, he mailed the packet to the Washington Regional Laboratory (Tr. 176-182). The envelope was received at the laboratory and assigned to a chemist

(Tr. 191-192). The chemist testified that the envelope had not been tampered with and was sealed and intact when he received it (Tr. 206-207). The chemist further testified that he opened the envelope himself, determined that the packet inside contained heroin, and placed the evidence in another sealed envelope (Gov't Ex. 3), where it remained until the time of trial (Tr. 208-210).

Petitioner asserts that, because the government did not establish the identity of the laboratory employee who transferred the sealed envelope containing the packet to the chemist, there was a break in the chain of custody requiring exclusion of the evidence. The "lock-seal" envelope in which Agent Shumard placed the evidence, however, was received intact by the chemist. Since the evidence could not have been tampered with without tearing or destroying the envelope, the government established that the condition of the evidence had not been altered from the time of the sale. The evidence therefore was properly admitted. See *United States* v. *Brown*, 482 F.2d 1226 (C.A. 8).

5. Petitioner next contends (Pet. 20-21) that inconsistent verdicts by the jury deprived him of due process. Petitioner was acquitted by the jury on the substantive charge of distributing heroin but was convicted of conspiring with Gore and others to commit that offense. Since the two charges required proof of different elements, however, the verdicts were not inconsistent.

In any event, due process is not violated by inconsistent verdicts. See *Dunn* v. *United States*, 284 U.S. 390. In view of this Court's recent reaffirmation of that principle in *Hamling* v. *United States*, 418 U.S. 87, 101, there is no merit to petitioner's suggestion that the holding in *Dunn* is "outdated" and should be reexamined.

6. Petitioner's final contention (Pet. 22-24) is that the conspiracy count of the indictment was defective because it duplicated the charges in the substantive count and because it charged both a conspiracy and a substantive crime in a single count.

The first count of the indictment[2] charged petitioner with conspiring to distribute heroin in violation of 21 U.S.C. 846; it did not charge any other crime. Petitioner's argument is that the wording of the last few lines of the first paragraph of the indictment, which allege that petitioner conspired to distribute heroin "in violation of Title 21, United States Code, Section 841(a)(1) and 846," charged him with both the conspiracy and the substantive violation in the same count of the indictment. That portion of the indictment, however, merely specified the substantive crime that was the object of the conspiracy. Petitioner was in fact charged with the substantive violation of 21 U.S.C. 841(a)(1) in the second count. Moreover, the last line of the conspiracy count of the indictment plainly alleged that the overt acts were "[a]ll in violation of Title 21, United States Code, Section 846," the conspiracy provision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]The text of the indictment is reproduced at Pet. App. 26-27, but the last line of the first count is omitted. The line following the listing of overt acts in the first count states, "[a]ll in violation of Title 21, United States Code, Section 846."